

A **PAN WIJAYA PROPERTY SDN BHD v.**
BIG INDUSTRIAL GAS SDN BHD & ANOTHER CASE
HIGH COURT SABAH & SARAWAK, BINTULU
LEE HENG CHEONG J
[SUIT NO: BTU 22-5-9-2013 &
B ORIGINATING SUMMONS NO: BTU-24-10-7-2013]
6 MAY 2016

C ***CONTRACT: Frustration – Sale and purchase – Sale and purchase transaction of land conditional upon grant of consent to transfer – Application for consent to transfer rejected – Whether contract for sale impossible to perform – Whether contract frustrated – Whether court could grant specific performance – Whether caveat lodged on land ought to be removed***

D By a sale and purchase agreement ('SPA'), the defendant agreed to sell and the plaintiff agreed to purchase a parcel of industrial land ('the said land') for a total consideration of RM3,100,000. The plaintiff paid the defendant a sum of RM620,000 as deposit and part payment of the purchase price upon signing the SPA with the balance sum of RM2,480,000 to be paid within three months upon the approval of consent for the transfer of the said land being obtained by the defendant from the Director of Lands and Surveys Sarawak. The plaintiff then lodged a caveat against any dealing of the said land. By virtue of cl. 6 of the SPA, the parties agreed that in the event the defendant was unable to execute the transfer of the said land in the manner stated in the SPA, the plaintiff was entitled to treat the SPA as null and void by mutual consent and, *inter alia*, the defendant shall refund the said
E RM620,000 to the plaintiff. Subsequently, the defendants informed the plaintiff that the SPA could not be completed as the Superintendent of Land and Survey Department of Bintulu Division had refused to grant the requisite consent and offered to refund the said RM620,00 to the plaintiff. The plaintiff, however, informed the defendant that it rejected the repudiation of
F the SPA and was prepared to pay the balance of the purchase price to the defendant prior to the necessary transfer of the said land if the defendant could duly execute, *inter alia*, a written permission from the defendant to the plaintiff to appeal for a consent of the Director of Land and Survey Sarawak for the transfer of the said land. The defendant refused to permit the plaintiff to appeal to the Director of Land. As a result of the repudiation, the plaintiff
H pleaded that it had suffered loss and damage. The defendant disputed the plaintiff's claim and contended that since the Superintendent of Land and Survey Department of Bintulu Division had refused to grant the requisite consent, the SPA was thus impossible to perform and was therefore frustrated pursuant to s. 57(2) of the Contracts Act 1950. The defendant further
I counterclaimed against the plaintiff for removal and damages for wrongful caveat. The issues that arose for consideration were (i) whether the contract

for sale of the said land had become impossible to perform and was therefore frustrated and void; (ii) whether the plaintiff was entitled to specific performance of the SPA; and (iii) whether the caveat lodged by the plaintiff ought to be removed.

Held (allowing plaintiff's claim; dismissing defendant's counterclaim):

- (1) The defendant had failed to strictly comply with the requirement of the special condition as it did not submit a proper application directly to the Director of Land and Survey. The purported application was instead submitted to the Superintendent of Land and Survey Bintulu Division. It was clear that the defendant had refused or neglected to appeal directly to the Director of Land and Survey for the requisite consent. Further, the application for the requisite consent contained material errors or misrepresentation of facts on the respective descriptions of the said land and the date of the registration of title. (paras 25 & 27)
- (2) The initial appeal by the defendant for the requisite consent was flawed in that the material particulars of the said land were wrong and that the application was sent to the wrong party. The defendant ought to have either re-submitted another application containing the correct particulars of the land to the proper person or lodged an appeal after rectifying the defects in the initial application. The defendant omitted to do either but instead proceeded to repudiate the SPA relying on frustration. This showed that the defendant had no intention to complete the SPA as there was no problem of getting consents for the transfer of lands used for industrial purposes as all industrial lands in Bintulu contained similar special conditions and it was a routine procedure. (paras 32 & 33)
- (3) The rejection of the defendant's application for the requisite consent does not make the performance of the SPA impossible as the defendant can still file a proper appeal against the said rejection. However, the defendant chose not to do so and pleaded frustration. Also, the defendant had wrongfully sought to look for an excuse for non-performance of the SPA even though the plaintiff was and is still willing, ready and able to pay the balance sum of the purchase price to the defendant prior to the transfer of the said land if the defendant could execute, *inter alia*, the written permission to appeal or re-submit the application for consent of the transfer of the same land. In the circumstances, the defendant had no credible reasons to reject the plaintiff's proposal and that. The defendant's reliance on the doctrine of frustration was misplaced and without basis as it was self-induced frustration. (paras 35 & 36)
- (4) The SPA was not a contingent or conditional contract there was no basis for the defendant to contend that the SPA had become frustrated before the defendant performed its obligation in the SPA by diligently making proper application directly to the Director of Land and Survey

- A Department rather than the Superintendent, by submitting the correct and accurate information of the said land and exhaust the internal appeal procedure before relying on the plea of frustration. As the parties have entered into a valid and binding SPA, the parties should perform their obligations diligently. (para 43)
- B (5) Since the consent of the Director of Land and Survey Department was required for the transfer of the said land, the court ought not lend its hand to grant relief which requires express consent which had not been obtained. In the circumstances, an order for specific performance of the SPA against the defendant ought not be granted. The counterclaim
- C against the plaintiff was also dismissed since the plaintiff has interest in the land which is caveatable by virtue of cl. 8 of the SPA. (paras 52 & 54)

Case(s) referred to:

- D *Guan Aik Moh (KL) Sdn Bhd & Anor v. Selangor Properties Bhd* [2007] 3 CLJ 695 CA (refd)
Kin Nam Development Sdn Bhd v. Khau Daw Yau [1984] 1 CLJ 347; [1984] 1 CLJ (Rep) 181 FC (refd)
Kong Ming Finance Corp Bhd v. Tropical Habitat Sdn Bhd [1990] 2 CLJ 242; [1990] 2 CLJ (Rep) 264 HC (refd)
- E *Institut Teknologi Federal Sdn Bhd v. IIUM Education Sdn Bhd & Another Appeal* [2008] 1 CLJ 745 CA (refd)
Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng @ Tan Tien Chi & Anor [1995] 3 CLJ 520 CA (refd)
Macon Engineers Sdn Bhd v. Goh Hooi Yin [1976] 1 LNS 67 FC (refd)
Ramli Zakaria & Ors v. The Government of Malaysia [1983] 1 CLJ 73; [1983] CLJ (Rep) 350 FC (refd)
- F *Silver Concept Sdn Bhd v. Brisdale Rasa Development Sdn Bhd* [2005] 3 CLJ 259 CA (refd)
Yee Seng Plantations Sdn Bhd v. Kerajaan Negeri Terengganu & Ors [2000] 3 CLJ 666 CA (refd)

Legislation referred to:

- G Contracts Act 1950, s. 57(2)
Specific Relief Act 1950, s. 21
For the plaintiff - Henry Ling; M/s Ling & Wong Advocs
For the defendant - Norman Liew & Camullus Lau; M/s Tan, Yap & Tang Advocs
- H *Reported by Sandra Gabriel*

JUDGMENT

Lee Heng Cheong J:

I Introduction

[1] The above two cases were consolidated by the Court of Appeal. For the purpose of this ground of decision, Pan Wijaya Property Sdn Bhd shall be referred to as the plaintiff and BIG Industrial Gas Sdn Bhd shall be referred to as the defendant.

[2] By the sale and purchase agreement dated 26 June 2012 (“SPA”), the defendant agreed to sell and the plaintiff agreed to purchase a parcel of industrial land described as Lot 2072 Block 26 Kemena Land District (“the said land”) for a total consideration of RM3,100,000; and the plaintiff paid to the defendant, a sum of RM620,000 as deposit and part payment of the purchase price upon signing of the SPA with the balance sum of RM2,480,000 to be paid three months upon consent in writing for the transfer given by the Director of Land and Survey Sarawak.

Undisputed And Agreed Facts

[3] From the pleadings and also the statement of agreed facts dated 7 April 2015 (encl. 61), this court finds that the undisputed facts are as follows:

- (i) the plaintiff was and is at all material times a company incorporated and registered in Malaysia under the Companies Act 1965 having its registered office at Lot 4060, Kidurong Light Industrial Estate, Jalan Tanjung Kidurong, 97000 Bintulu, Sarawak;
- (ii) the defendant was and is at all material times a company incorporated and registered in Malaysia under the Companies Act 1965 having its registered office at 19D, 4th Floor, Block 2, Worldwide Centre, Jalan Tinju 13/50, Section 13, 40675 Shah Alam, Selangor;
- (iii) the defendant is the registered proprietor of all that parcel of land situates at Kidurong Road, Bintulu, containing an area of 1.2243 hectares, more or less and described as Lot 2072 Block 26 Kemena Land District, (the said land);
- (iv) by the sale and purchase agreement in writing dated 26 June 2012 made between the defendant and the plaintiff (“the SPA”), the defendant agreed to sell and the plaintiff agreed to purchase the said land for the price of RM3,100,000 subject to the terms and conditions of the agreement;
- (v) the plaintiff has paid the said RM620,000 to the defendant; and
- (vi) the plaintiff has lodged caveat against any dealing of the said land registered as Instrument No. L.703/2013 at Bintulu Land Registry on 5 February 2013.

The Plaintiff's Case

[4] The plaintiff pleaded that at all material times both the plaintiff and the defendant were fully aware of the special condition endorsed or to be endorsed on the document of title of the said land which provided that no transfer affecting the said land may be effected without the consent in writing of the Director of Land and Survey Sarawak.

- A [5] Pursuant to cl. 2(b) of the SPA, it was agreed by the parties that the balance sum of RM2,480,000 is to be paid by the plaintiff to the defendant, three months upon approval of the consent for the transfer of the said land obtained by the defendant from the Director of Land and Survey Sarawak, which is the basis for the calculation of the date fixed for the completion or
- B performance of the contract.
- [6] By cl. 6 of the SPA, the parties agree that in the event the defendant fails, refuses or is unable to execute the transfer of the said land in the manner stated in the SPA in favour of the plaintiff, the plaintiff is entitled to treat the SPA as cancelled, null and void as by mutual consent and thereupon the
- C defendant shall refund the said RM620,000 and in addition thereto the defendant shall pay the like sum as pre-estimated liquidated damages and neither party shall have any claim for costs, compensation or otherwise plaintiff to specific performance.
- [7] Pursuant to cl. 8 of the SPA, the plaintiff has lodged a caveat against
- D any dealing of the said land.
- [8] By a letter dated 28 March 2013 issued by the defendant's advocates, the plaintiff was informed by the defendant that the SPA cannot be completed and treated the SPA, as void and offered to refund the said RM620,000 by
- E a cheque to the plaintiff.
- [9] By a letter dated 2 April 2013 issued by the plaintiff's advocates, the plaintiff refunded the said cheque to the defendant, and rejected the defendant's repudiation of the SPA. The plaintiff pleaded that at all material times, the plaintiff was still able, ready and willing to perform all of its
- F contractual obligations under the SPA.
- [10] The plaintiff *vide* a letter dated 18 March 2013, informed the defendant that it rejected a repudiation of the SPA and was prepared to pay the balance of the purchase price to the defendant prior to the necessary transfer of the said land if the defendant could duly execute all the necessary instruments
- G and documents including memorandum of transfer, power of attorney with full powers to do all matters as the registered proprietor could do personally and the written permission to appeal or resubmit the application for consent of the transfer of the said land but this was rejected by the defendant.
- [11] By a letter dated 20 May 2013, the common solicitors acting for both
- H the plaintiff and the defendant, Messrs Kadir, Wong, Lin & Co informed the defendant that the plaintiff would like to secure permission from the defendant, to appeal for a consent of the Director of Land and Survey Sarawak for the transfer of the said land, and that the plaintiff was confident that the appeal would meet the approval requirement of the Director of Land and Survey but
- I the defendant refused to permit the plaintiff, to appeal to the Director of Land and Survey.

[12] As a result of the repudiation, the plaintiff pleaded that it has suffered loss and damage which could not be adequately compensated by monetary damages. A

[13] The plaintiff further pleaded that the defendant shall not profit by its default or unilateral repudiation of the SPA or otherwise fails or refuses to perform its part under the SPA when the plaintiff is willing and able to wait for the defendant to obtain a consent in writing of the Director of Land and Survey Sarawak in effecting the transfer of the said land in accordance with the express term of the SPA. B

[14] In the premises, the plaintiff sought the following remedies: C

- (i) all necessary and consequential accounts, directions and inquiries;
- (ii) further or alternatively, damages for breach of contract with assessment of damages on the consequential loss and damage and interest thereon;
- (iii) interest; and D
- (iv) costs.

The Defendant's Case

[15] The defendant contended that the plaintiff and the defendant were fully aware of the special condition that no transfer affecting the said land may be effected without the consent in writing of the Director of Land and Survey Sarawak. E

[16] The defendant also contended that the sale of the said land was/is subject to the consent in writing of the Director of Land and Survey Sarawak for the transfer of the said land to the plaintiff. F

[17] The defendant also pleaded that the caveat lodged by the plaintiff, was not pursuant to cl. 8 of the SPA as it was lodged eight months after the execution of the SPA and after Messrs Kadir, Wong, Lin & Co Advocates was informed by the defendant that the application for consent to transfer was rejected by the Department of Land and Survey Sarawak. G

[18] The defendant disputed the plaintiff's claim and pleaded that the objective of the SPA was to sell and transfer the said land from the defendant to the plaintiff for a sum of RM3,100,000 subject to the consent in writing of the Director of Land and Survey Department Sarawak for the transfer. Since the director had refused to grant the requisite consent, the SPA was thus impossible to perform and therefore is void. H

[19] In respect of the plaintiff's proposal whereby the plaintiff required the defendant to execute a power of attorney in favour of the plaintiff over the said land with full power to do all matters as the registered proprietor could do personally. The defendant contended that in the SPA, the defendant only I

A agreed to a simple sale and transfer of the said land to the plaintiff subject to the consent in writing for the transfer by the Director of Land and Survey Sarawak.

[20] In essence, the defendant contended as follows:

- B (i) the contract is impossible to perform and therefore void;
- (ii) it is clear from the contents from the Land and Survey Department's letter dated 12 March 2013 bearing Reference No. 11526/10-3/9 (Vol 91) that any appeal would have been useless;
- C (iii) the Director of Land and Survey Sarawak cannot be compelled to entertain any further application or appeal;
- (iv) there was/is no agreement between the parties for further application or appeal;
- (v) there was/is no procedure or provision for further application or appeal;
- D and
- (vi) the defendant cannot be made to wait indefinitely for the consent.

[21] Further, the defendant counterclaimed against the plaintiff as follows:

- E (i) for the removal of caveat registered on 5 February 2013 at the Bintulu Land Registry Office *vide* Instrument No. L703/2013;
- (ii) damages for wrongful caveat;
- (iii) interest at the rate of 5% p.a. on damages from 5 February 2013 until full and final settlement; and
- F (iv) costs.

Consideration Of The Case

[22] In encl. 63, the defendant proposed the following issues to be tried and they are as follows:

- G (i) whether the contract for sale of the said land has become impossible to perform and is therefore frustrated and void for the reason that the application by Messrs Kadir Wong Lin & Co Advocates *vide* their letter dated 30 January 2013 for consent for the transfer of the title of Lot 2072 Block 26 Kemena Land District was rejected on the ground that the application “tidak dapat dipertimbangkan”;
- H (ii) whether the plaintiff is entitled to specific performance of the SPA or damages for breach of contract or otherwise; and
- I (iii) whether the caveat lodged by the plaintiff on Lot 2072 Block 26 Kemena Land District *vide* Land Instrument L703/2013 registered on 8 February 2013 at the Bintulu Land Registry Office ought to be removed.

Whether The Contract For Sale Of The Said Land Has Become Impossible To Perform And Is Therefore Frustrated And Void For The Reason That The Application By Messrs Kadir Wong Lin & Co Advocates Vide Their Letter Dated 30 January 2013 For Consent For The Transfer Of The Title Of The Said Land Was Rejected On The Ground That The Application “Tidak Dapat Dipertimbangkan”?

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[23] The defendant contended that the SPA has become impossible and void based on the letter dated 12 March 2013 issued by the Superintendent of Land and Survey Department of Bintulu Division on the basis that the SPA was frustrated pursuant to s. 57(2) of the Contracts Act 1950.

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[24] When the SPA was signed, the parties herein were both fully aware of the requirement of the said consent and this was provided for, in the SPA as follows:

- (i) recital B of the SPA showed that the defendant as vendor and the plaintiff as purchaser were fully aware that “as endorsed on the document of title is no transfer affecting the said land may be effected without the consent in writing of the Director of Land and Survey”; and
- (ii) by cl. 2(b) of the SPA, they agreed that “the balance in the sum of ... RM2,480,000 ... to be paid ... three months upon approval for consent to transfer by Director of Land and Survey”.

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[25] From the evidence adduced, this court finds that the defendant had failed to strictly comply with the requirement of the said special condition (viii) as it did not submit a proper application directly to the Director of Land and Survey. The purported application was submitted to the Superintendent of Land and Survey of Bintulu Division instead who responded accordingly with the said letter dated 12 March 2013. From the testimonies of the two independent witnesses namely PW1 - the common solicitor for both parties, it is clear that the defendant had refused or neglected to appeal directly to the Director of Land and Survey for the requisite consent even though the plaintiff requested the defendant to do so.

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[26] PW3 - Sajeli bin Kipli, the Director of Land and Survey Sarawak, being the person/post named in the special condition of the title of the said land whose written consent was required for the transfer of the said land, testified and referred to other identical or similar special condition of other lands in Bintulu which requires “the consent in writing of the Director of Land and Survey” for their transfers. PW3 testified that all these other lands also required consent in writing from the Director of Land and Survey to transfer these lands which are “conditioned for industrial land purposes” “to ensure that the land is utilised for the stated purpose”.

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A [27] Referring to p. 20 of bundle E, PW3 testified that the letter of application for permission to deal was “addressed to the Superintendent of Land and Survey Department” of Bintulu Division. In other words, there was no application to him or addressed directly to him pursuant to special condition (viii) of the title condition of the said land. With further reference
B to the application for permission to deal itself at pp. 81 to 83 of bundle E, PW3 – the director compared the “description of land under the term of title and date of registration of title under this application with the printout title of the said land at pp. 16 & 17 of bundle E” and testified that in “the document at p. 81, it stated the term of title is (perpetuity) while the date of registration of title is 22 November 1996” when in fact it was stated in the
C printout of title of the said land at p. 16, that “the term of title ... is stated as 60 years whereas the date of registration here is recorded as 15 August 2012”. In other words, the application for the requisite consent itself contained material errors or misrepresentation of facts on the respective descriptions of the said land and the date of registration of title.

D [28] Referring to p. 84 of bundle E, which is a letter, referring to a reply to another letter at p. 20 of bundle E, PW3 testified that the letter at p. 84 was issued by the Superintendent of Land and Survey Department Bintulu Division, which conveyed a decision, rejecting the application by the defendant for the requisite consent. According to PW3, the defendant has
E two options, firstly to abandon the application if it refused to pursue or secondly, continue with the transfer or to submit an appeal if it wished to pursue or continue with the transfer. The defendant in the present case, decided not to appeal and opted to repudiate the SPA and to refund the said deposit and part payment of the purchase price of the said land notwithstanding
F the plaintiff’s request to lodge a proper appeal.

[29] It is not disputed that there was no appeal lodged to the Director of Land and Survey Department and this is confirmed by PW3. In his testimony, PW3 also testified that the initial rejection is appealable and it was known to the parties in this action that there is an appeal procedure for
G lodging an appeal to the director against the non-granting of the consent. PW3 testified as follows:

Q: Once an application for consent is not approved, what is the next step that the applicant can do?

H A: The applicant has the choice of not to pursue the application further or submit an appeal.

Q: Is there any appeal being submitted by the Applicant in this case?

A: As far as the record in the headquarters is concerned, there is none.

I Q: If there is an appeal, what sort of consideration will be given for the approval of the consent?

- A: I'm afraid I cannot answer the question because I am not privy to the documentation that may be submitted. A
- Q: Can you enlighten the Court what are the factors the Director could consider for approval of the consent?
- A: One of them would be that the usage remains as what it was initially intended for. B
- Q: Can you assist the Court to elaborate other factors if any to your memory?
- A: Another factor that would be looked into is what we would describe as the genuineness of the transfer. C
- Q: Can you explain the meaning of genuineness of the transfer?
- A: For example that there is documentary evidence that the proposed transfer is consented by both parties as well as commitment to construct the building in accordance with the condition of the title.
- Q: As to the documentary evidence that the proposed transfer is consented by both parties, what would you expect the document to be? D
- A: That would take the form of signed Sale & Purchase Agreement.
- Q: As for the documentary evidence regarding to the commitment to construct the building in accordance with the condition of the title, can you explain what would this document be? E
- A: Among others there should be an undertaking, submission of relevant plans example building plans.
- [30]** In cross-examination, PW3 testified that the purported appeal at pp. 21 & 22 of bundle E which was addressed to the Superintendent of Land and Survey Bintulu Division, which was issued by Kadir, Wong, Lin & Co, the common solicitors, was never delivered or sent, hence no appeal was ever lodged. F
- [31]** The testimony of PW3 on this particular issue, is corroborated by the common solicitor, PW1 - Mr Ting Kok Tiong who testified as follows: G
- Q10: Refer to two identical letters dated 30.1.2013 produced at pages 21 and 22 of Enclosure 60 (Bundle E). Can you confirm this was the letter prepared and signed by you saying "We are instructed that our client has been informed verbally that the above application has been rejected on the ground that the title for the said property has just been released by the Lands and Surveys Department". From this letter, who had instructed you, and how did your client know it orally? H
- A10: Yes, I was the maker and signatory of the letter. I issued this letter after I learned it from to the Defendant's Branch Manager Mr Lee Yun Siong or Mr Raynold. I

A Q11: Again on the same said page 21 or 22, it says “We are instructed to appeal for your further consideration as our client has brought the land since 1995. The Original title was not issued because there was certain amount of balance remained outstanding”. Can you clarify who instructed you, and who informed you the information that your client had bought the said Land since 1995, and how much was the outstanding sum and when was it finally settled?

B A11: I was instructed to appeal either by the Defendant’s Branch Manager Mr Lee Yun Siong or Mr Raynold. Mr Lee Yun Siong informed me that the Defendant has bought it since 1995.

C Q12: Did you present your letter to the Superintendent as per the said page 21 or 22 of Enclosure 60 for service or delivery to the person addressed therein?

A12: No. Never.

D [32] From the evidence adduced, this court finds that the initial appeal by the defendant for the requisite consent was flawed in that the material particulars of the said land was wrong and that the application was sent to the wrong party. The defendant ought to have either resubmit another application containing the correct particulars of the said land and to the proper person or lodged an appeal after rectifying the defects in the initial application. The defendant decided or omitted to do either. Instead the defendant then proceeded to repudiate the SPA, relying on frustration. This showed that the defendant had no intention to complete the SPA. Furthermore there was evidence adduced, to show that chances of an appeal succeeding is high.

F [33] This court finds that from the testimony in cross-examination of DW1 – Lau Keat Hoo, he was fully aware of the fact that there was no problem of getting consents for the transfer of lands used for industrial purposes as all industrial lands in Bintulu contained similar special conditions and it is a routine application/procedure for Bintulu conveyancing solicitors, for such lands. In cross-examination, DW3 testified:

G Q: I refer you to page 120-121 of Bundle E. Can you look at this printout letter for Lot 3617. Do you agree the special condition (v) here is identical with special condition (vii)?

A: I agree.

H Q: I put it to you this Lot 3617 was transferred twice with consent of the Director of Land & Survey. Do you agree?

A: I agree.

I Q: According to page 121 of Bundle E, I put it to you the subsequent latest transfer was registered on 14.5.2013 was 9 years after the issuance of title, do you agree?

A: 7 years.

Q: I put it to you even for this parcel Lot 3617 special condition (v) has no impact on the consent of the transfer. A

A: I don't agree.

Q: I refer you to page 128 of Bundle E. I put it to you based on the record, the transfer of this parcel Lot 4033 was registered on 14.7.2011, do you agree? B

A: I agree.

Q: I put it to you the transfer of this ownership was effected less than 7 months from the date of issuance of title, do you agree?

A: From the record, it appears to be so. C

The Relevant Laws And Principles

[34] In *Guan Aik Moh (KL) Sdn Bhd & Anor v. Selangor Properties Bhd* [2007] 3 CLJ 695, Gopal Sri Ram JCA, (as he then was), referring to the doctrine of frustration and s. 57 of the Contracts Act held at p. 704A-D(7) as follows: D

It follows from the foregoing authorities that there are three elements woven into the fabric of the doctrine embodied in s. 57. First, the event upon which the promisor relies as having frustrated the contract must have been one for which no provision has been made in the contract. If provision has been made then the parties must be taken to have allocated the risk between them. E

Second, the event relied upon by the promisor must be one for which he or she is not responsible. Put shortly, self-induced frustration is ineffective.

Third, the event which is said to discharge the promise must be such that renders it radically different from that which was undertaken by the contract. The court must find it practically unjust to enforce the original promise. F

If any of these elements are not present on the facts of a given case, then s. 57 does not bite.

[35] This court finds that the defendant has failed to satisfy and prove the three elements mentioned under the doctrine of frustration as explained by Gopal Sri Ram JCA in *Guan Aik Moh's* case or embodied in s. 57 of the Contracts Act 1950. In the SPA, the balance sum of the purchase price is payable, three months upon approval for consent of the transfer. Both parties are fully aware of the requirement of the said consent and there is no change of circumstances rendering a fundamental or radical change in the obligation originally undertaken to make the performance of the SPA something radically different from that originally undertaken. The rejection of the defendant's application for the requisite consent does not make the performance of the SPA impossible as the defendant can still file a proper appeal against the said rejection or refile a proper application with any erroneous particulars but the defendant chose not to and instead pleaded frustration. G
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- A [36] This court also finds that the defendant has wrongfully sought to look for an excuse for non-performance of the SPA even though the plaintiff was and still willing, ready and able to pay the balance sum of the purchase price to the defendant at any time in accordance with the terms and conditions of the SPA. The plaintiff had through its solicitors by a letter dated 18 March
- B 2013 rejected the repudiation of contract and prepared to pay the balance of the purchase price to the defendant prior to the necessary transfer of the said land if the defendant could duly execute all the necessary instruments and documents including the written permission to appeal or resubmit the application for consent of the transfer of the said land. This court finds that
- C the defendant had no credible reasons to reject the plaintiff's proposal and that the defendant's reliance on the doctrine of frustration is misplaced and without basis as it was self-induced.

- D [37] Guidance can be found in *Yee Seng Plantations Sdn Bhd v. Kerajaan Negeri Terengganu & Ors* [2000] 3 CLJ 666, Gopal Sri Ram JCA, (as he then was) held as follows:

Now, it is well-settled that the doctrine of frustration has no room where there is fault on the part of the party pleading it. Another way of putting it is that self-induced frustration is no frustration. See, *Dato Yap Peng Eng & Ors v. Public Bank Bhd & Ors* [1997] 4 CLJ 115 (refd) [1997] 3 MLJ 484.

- E [38] In *Guan Aik Moh (KL) Sdn Bhd & Anor v. Selangor Properties Bhd (supra)* Gopal Sri Ram JCA, (as he then was), held as follows:

- F We are thus left with a simple test that a situation must arise which renders performance of the contract 'a *thing radically different* from that which was undertaken by the contract'... *To see if the doctrine applies, you have first to construe the contract and see whether the parties have themselves provided for the situation that has arisen. If they have provided for it, the contract must govern*".

(emphasis added)

- G [39] In *Ramli Zakaria & Ors v. The Government of Malaysia* [1983] 1 CLJ 73; [1983] CLJ (Rep) 350, Abdul Hamid Omar FJ (as he then was) held as follows:

- H In short it would appear that where after a contract has been entered into there is a **change of circumstances** but the changed circumstances do not render a **fundamental or radical change** in the obligation originally undertaken to make the performance of the contract something radically different from that originally undertaken, **the contract does not become impossible** and it is not discharged by frustration.

(emphasis added)

- I [40] In *Kin Nam Development Sdn Bhd v. Khau Daw Yau* [1984] 1 CLJ 347; [1984] 1 CLJ (Rep) 181, the Federal Court held that the doctrine of frustration had no application to the case and the special conditions were not completely unexpected, the substance of each of the contracts remained the

same as before the special condition was imposed and the basis of the doctrine of frustration is not hardship or inconvenience or material loss but such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for. Salleh Abas CJ (Malaya) as he then was held at pp. 258H-259C as follows:

The doctrine of frustration which operates to terminate a contract is of recent origin. (see *Taylor v. Caldwell* (1863) 3 B & S 826; 122 ER 309). It occurs in a situation where due to a change of circumstances a contract is rendered legally and physically impossible of performance. The doctrine is an exception to the general rule as to an absolute contract in that a person who specifically undertakes an absolute obligation cannot afterwards claim to be absolved from liability by the fact that his failure to perform the obligation is due to the occurrence of an event over which he has no control. **The doctrine does not apply just because the promisor's obligation has become, because of change of circumstances, more onerous than what he has contracted for. The basis of the doctrine is, as stated by Lord Radcliffe in *Davis Contractors Ltd v. Fareham UDC* [1956] AC 696, 729 to be "not hardship or inconvenience or material loss", but "such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for".** In *Jackson v. Union Marine Insurance Co Ltd* (1874) LR 10 CP 125 the charterers were held justified to throw up their contracts with the ship-owners when the chartered ship was, due to damages, unable to load the agreed cargo as the loading of cargo after the ship had been repaired would have been "a new adventure" or "a new agreement". Bramwell B, held that the parties were discharged by the ship's inability. In the present appeal there can be no doubt that it would be a heavy financial burden on the appellant to build the houses contracted for and to complete the contracts with its purchasers because costs have since spiralled. But this point is not a relevant factor for calling the doctrine of frustration into play. **To invoke the doctrine the appellant must show that the completion of every one of these contracts is in substance a different obligation from what it had previously agreed to, i.e. a new agreement altogether.** In our view the substance remains the same. Each of these contracts was and still is for the sale of house which the appellant has agreed to build. The special condition which enjoins the appellant to reserve 30% of the houses (in practical terms 10 houses) to be built for the Pahang State Development Corporation may well result in the impossibility of the appellant to determine with fairness who amongst its purchasers are to be deprived of their contracts and who to have their contracts performed, especially when the Pahang State Government gives no indication, nor guidance as to how the appellant should go about in complying with the special condition. To choose certain particular purchasers as those who should lose out even at random may be arbitrary and cause an injustice on them, unless they all agree. But despite this difficulty or impossibility the special condition does in no way change the substance of the appellant's agreement with its purchasers. It can still perform 70% of the contracts, although it may not be able to do justice when choosing which contracts it should perform.

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- A The booking was done and accepted before the land was sub-divided. There is no basis for the appellant to assume that its application for subdivision and conversion would be approved without conditions or even approved at all. It should have first waited for the decision of the Pahang State Government on the fate of its application before venturing to advertise and accept booking fees for the proposed subdivided lots.
- B *It is no defence for it to say that the special conditions were completely unexpected, because under the law the State Government could even refuse the application altogether, if it was so minded. The appellant had no good reason to expect that its application would be approved at all. As it took great risk so it must pay for it.*
(emphasis added)
- C [41] In the present case, the defendant refused to lodge an appeal to the director for the said requisite consent even though the initial application was flawed and the chances of a successful appeal is high. In cross-examination, DW1 - Lau Keat Hoo testified as follows:
- D Q: Refer to page 90 of Bundle E. I put it to you the Defendant do not wish to appeal for the approval of consent to be considered by the Director of Land & Survey.
- A: I agree but because time is of the essence and one of the condition as I have explained earlier in the title clause (v) which has given us a short time frame to develop the land and we risk losing the land if we do not develop the land by 2019.
- E [42] On the same issue, PW1 - Ting Kok Tiong, being the common solicitor for both parties herein as follows:
- F Q19: Refer to the letter dated 20.5.2013 at page 90 of Enclosure 60 (Bundle E), was this letter issued or signed by you? What is this letter about?
- A19: Yes, I was the maker of the letter. Before I issued this letter, Mr Chieng Kai Chai of the Plaintiff had requested me to make presentation or appeal directly to the Director of Lands & Surveys for the consent to transfer the said Land, so I had written this letter to the Defendant seeking for its instruction. Given the fact that I was acting for both parties and for such application or appeal for the said consent, I had to get the mandate from the Defendant. When I issued that letter, I hoped the parties could resolve the dispute but toward that end, I need to get the mandate and instruction from both parties.
- G [43] This court finds that as the SPA is not a contingent or conditional contract, there is no basis for the defendant to contend that the SPA has become frustrated before the defendant performed its obligation in the SPA by diligently making a proper application directly to the Director of Land
- H Q20: Did you get any instruction or response from the Defendant in respect of your letter at page 90 of Enclosure 60 (Bundle E)?
- A20: No.
- I [43] This court finds that as the SPA is not a contingent or conditional contract, there is no basis for the defendant to contend that the SPA has become frustrated before the defendant performed its obligation in the SPA by diligently making a proper application directly to the Director of Land

and Survey Department rather than the Superintendent, by submitting the correct and accurate information of the said land and exhaust the internal appeal procedure before relying on the plea of frustration. As the parties have entered into a valid and binding SPA, the parties should perform their obligations diligently.

[44] In *Kin Nam Development Sdn Bhd v. Khau Daw Yau* (*supra*), the booking by a house purchaser was done and accepted before the land was sub-divided where the vendor assumed that its application for subdivision and conversion would be approved without conditions but the special conditions imposed by the State Government were completely unexpected. So, the vendor pleaded frustration. The Federal Court through Salleh Abas CJ (Malaya) explained the doctrine of frustration at p. 184 as follows:

The doctrine does not apply just because the promisor's obligation has become, because of change of circumstances, more onerous than what he has contracted for. The basis of the doctrine is, as stated by Lord Radcliffe in *Davis Contractors Ltd v. Fareham UDC* [1956] AC 696 at 729 to be "not hardship or inconvenience or material loss", but "such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for."

To invoke the doctrine the appellant must show that the completion of every one of these contracts is in substance a different obligation from what it had previously agreed to, i.e. a new agreement altogether.

[45] In *Silver Concept Sdn Bhd v. Brisdale Rasa Development Sdn Bhd* [2005] 3 CLJ 259, the court held as follows:

... the foundation and subject matter of the contract was the sale and purchase of the said land. The character of the said land remained the same. There is no supervening event which significantly changed the nature of the said land. The said land has not become radically different from that which was undertaken by the contract (see *Davis Contractor's case, supra*).

(emphasis added)

[46] From the evidence adduced at the trial and in light of above authorities and cases, this court finds that it is clear that the plaintiff is willing, ready and able to perform the SPA for the purchase of the said land and that the defendant's refusal to re-apply or appeal to the director for the requisite consent, is self-induced frustration. The so-called frustration was self-induced as the SPA has expressly stipulated the timing for the payment of the balance of the purchase price and hence they are bound by the terms of the SPA. Furthermore, the said land is still there and thus the doctrine of frustration does not apply. In cross-examination, DW1 - Lau Keat Hoo testified:

Q: I put it to you the frustration as alleged by you was caused by the Defendant, do you agree?

A A: I do agree because the title was issued late but the purchaser is fully aware.

I wish to change my answer to I do not agree.

[47] In *Ramli Zakaria & Ors v. The Government of Malaysia (supra)*, the Federal Court held as follows:

B The test is an objective one to determine whether there has been a radical change in the actual effect of the promises of the parties construed in the light of the new circumstances.

C [48] This court also finds that it is not disputed that the said land is strategically located along Tanjong Kidurong Road Bintulu, and that after signing the SPA, the market value of landed properties at the strategic location ie, along Tanjong Kidurong Road Bintulu has increased substantially and with a booming property market in Bintulu. As the result, the defendant changed its mind and decided to repudiate the SPA and sought to refund the said deposit. In cross-examination, DW1 - Lau Keat Hoo testified:

Q: I put it to you the Defendant had decided to terminate the Sale & Purchase Agreement because there was a drastic increase of the price of properties along Jalan Tanjung Kidurong Bintulu.

E A: **I agree that there is increase of price of properties in Bintulu** but I disagree that the termination is a reason of this agreement is a reason. In fact this agreement was frustrated when the consent to transfer was rejected.

(emphasis added)

F [49] The evidence from DW1 showed that the defendant had bought the said land at RM484,039.25 and agreed to sell it for RM3,100,000. In cross-examination, he testified:

Q: I put it to you the Defendants had purchased the land for the price of RM484,039.25.

G A: I agree but subsequently we paid the total amount of RM789,963.75.

Q: I put it to you the subsequent amount you have paid it was because the Defendant's late payment which has incurred interest charges paid to Bintulu Development Authority.

A: I agree.

H *Whether The Plaintiff Is Entitled To Specific Performance Of The SPA Or Damages For Breach Of Contract Or Otherwise?*

[50] Section 21 of the Specific Relief Act 1950 reads as follows:

I (1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant any such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.

(2) The following are cases in which the Court may properly exercise discretion **not to decree specific performance**:

(a) ...

(b) Where the performance of a contract would involve some hardship to the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff.

(emphasis added)

[51] In *Kong Ming Finance Corp Bhd v. Tropical Habitat Sdn Bhd* [1990] 2 CLJ 242; [1990] 2 CLJ (Rep) 264; [1990] 3 MLJ 243, whereby Chong Siew Fai J (as he then was) held as follows:

In my opinion, the court ought not lend its hand to grant the relief as sought in protection of an interest arising from a dealing the creation of which requires express consent which had not been obtained, and the performance of which relief, if granted and if capable of having it enforced upon the vendor as the registered landowner to perform, would contravene an express provision of the law and render the registered landowner liable to committing an offence and his land liable to forfeiture. In other words, there can, in my view, be no question of the alleged contractual right of the applicant being capable of specific performance since an order of specific performance as claimed would, in the circumstances, be tantamount to authorising the applicant to enforce or to compel the vendor or his estate (if compellable) or to compel the borrower to do something which is prohibited by the document of title relating to the said land, thereby rendering the registered landowner liable to be guilty of an offence or the said land liable to forfeiture under s 33 of the Land Code.

[52] Since the consent of the Director of Land and Survey Department is required for the transfer of the said land and applying the reasoning of Chong Siew Fai J (as he then was) in the case of *Kong Ming Finance Corp Bhd v. Tropical Habitat Sdn Bhd* (*supra*) where His Lordship held that the court ought not lend its hand to grant relief which requires express consent which had not been obtained, and should the relieve be granted, the performance of which relief, would contravene an express provision of the law, this court shall not grant an order of specific performance of the SPA against the defendant.

Whether The Caveat Lodged By The Plaintiff On Lot 2072 Block 26 Kemena Land District Vide Land Instrument L703/2013 Registered On 8 February 2013 At The Bintulu Land Registry Office Ought To Be Removed?

[53] The defendant's counterclaim is a repetition of Originating Summons No. BTU-24-10/7-2013 between the same parties which has been consolidated by the Court of Appeal. This court finds that the defendant failed to plead and prove the material facts and particulars upon which its counterclaim could be established and how it has suffered loss and damage as a result of the plaintiff's breach but only if any breach.

A [54] Based on the evidence adduced, this court finds that the plaintiff has proved its interest in land which is caveatable by virtue of the written contract ie, the SPA which the parties have mutually agreed to be bound by it. Clause 8 of the SPA stipulates as follows:

B The Vendor hereby agrees and allows the Purchaser to lodge a Caveat against the said Land upon signing of this Agreement.

[55] This court is guided by the case of *Macon Engineers Sdn Bhd v. Goh Hooi Yin* [1976] 1 LNS 67; [1976] 2 MLJ 53 where Gill CJ held as follows:

C It would seem abundantly clear from the authorities that, *so long as there is in existence a valid agreement for the sale of land, the purchaser is entitled to lodge a caveat to protect his rights under the contract and to sue for specific performance of the agreement.*

(emphasis added)

D [56] In *Institut Teknologi Federal Sdn Bhd v. IIUM Education Sdn Bhd & Another Appeal* [2008] 1 CLJ 745; [2007] 7 MLJ 23, Richard Malanjum JCA, (as he then was), after considering the guidelines stated in *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng @ Tan Tien Chi & Anor* [1995] 3 CLJ 520; [1995] 1 MLJ 719 in the judgment of the Court of Appeal, held as follows:

E It is also essential to understand that the purpose of a private caveat is to preserve the *status quo* pending the filing of action by a caveator to enforce his claim to an interest in the land (see *Registrar of Titles, Johore v. Temenggong Securities Ltd* [1976] 2 MLJ 44).

Order

F [57] In light of this court's above findings, this court finds that the plaintiff had proven his case against the defendant on the balance of probabilities. In the premises, this court grants an order in terms of the plaintiff's claim as follows:

G (i) that since the consent of the Director of Land and Survey Department is required for the transfer of the land in question, an order of specific performance of the SPA shall not be granted against the defendant;

(ii) that an order that the counterclaim be dismissed with costs;

(iii) that the above originating summons be dismissed with costs;

H (iv) that damages for breach of the SPA is awarded to the plaintiff, with assessment of damages on the loss and damages thereon by the Senior Assistant Registrar; and

(v) costs to the plaintiff.

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